ISSUE 45 April 2000

The band strikes up again but softly

Midland Bank Plc v Madden EAT
7th March 2000(unreported)

THOMPSONS
SOLICITORS

Strict test for insolvency payments

Secretary of State for Trade and Industry v Walden and another (Unreported 22.7.99)

In order for an employee to qualify for payments out of the National Insurance Fund the employer has to be "insolvent". If the employer is a company, insolvent means that a "statutory event" has occurred which is either that:

- there is a winding up order, administration order or resolution for winding up; or
- a receiver has been appointed; or
- a voluntary arrangement has been approved under the Insolvency Act 1986.

In this case the company had been in financial difficulties and was dissolved during 1997. The applicant, Ms Walden, did not receive her pay in lieu of notice and so she brought an employment tribunal claim against the company. The employment tribunal brought the Secretary of State into the proceedings.

The documents before the tribunal showed that the company was in financial difficulties and Companies' House official documents showed that the company was dissolved.

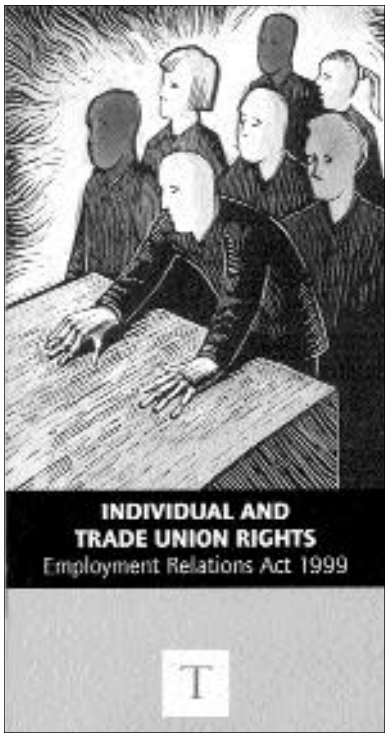
The tribunal decided that the dissolution together with the financial difficulties made it almost certain that one of the statutory events had occurred, that the company was insolvent and the Secretary of State was responsible for the payments. The Secretary of State appealed. The EAT allowed the appeal on the basis that the employment tribunal decision was perverse and wholly unsupported by evidence. It said that applicants must bring forward some evidence that one of the statutory events has occurred. Had one of the statutory events occurred it would have been capable of direct documentary proof from Companies' House. The absence of such proof suggested that the dissolution of the company could have been for some reason other than insolvency, such as being struck off the register as defunct.

So the applicant's claim had to fail. The only remedy for the applicant was to petition for a winding up order for the company. Anyone who has tried this will know it is a time consuming, slow and costly business. A dissolved company will first of all need to be restored to the roll of companies before it is wound up. If a number of employees are affected it may be possible to pool the costs, but until there is a winding up order in place the Secretary of State via the National Insurance Fund will not pay up. When the amounts of money involved are relatively small, the costs of the winding up petition may be more than the debt owed.

This case is a cautionary tale for those who seek payments from the Secretary of State.

Where a "statutory event" has occurred evidence can be obtained from Companies House, but if the Company has been dissolved without one of the formal insolvency measures taking place, employees may be left with nothing.

Employees of companies who go out of business are badly served by the law, when a company folds employees are left with few effective remedies and even less money.



Further and better particulars

Greene v London Borough of Hackney EAT/1182/98 and EAT/504/99

Employment Appeal Tribunal Unreported 23 November 1999

Requests for further and better particulars are depressingly familiar to applicants' representatives in tribunal claims, particularly discrimination cases. Sometimes, no matter how much information you put in the originating application, the respondent comes back with a swingeing request.

In this case, the Tribunal had made an order for the applicant to answer 18 requests for further particulars. When the applicant did not comply, her case was struck out. She appealed and supplied some answers late.

The Employment Appeal Tribunal held that the strike out order should not have been made without first considering less punitive sanctions, such as an "unless" order, so-called because it states that unless the particulars are provided by a certain date, the claim will be struck out.

The ultimate test is whether a fair trial can go ahead without the other side having the particulars that have been ordered. The Tribunal had asserted that "memories fade and people cease to be available". That was insufficient and a general statement of no value unless backed up with evidence and findings on the question and an analysis of the importance of the factor in whether unacceptable prejudice was caused.

So far so good, but the EAT were not impressed by replies that simply referred to a document, in the possession of the parties. In future representatives may need to quote the actual extract from the document they are referring to.

In Greene, the Respondent wanted to know both the particulars and the evidence of the unfavourable treatment which the Applicant alleged. It was not enough for the Applicant to say that evidence would be provided by the Applicant in the course of giving her evidence. The Employment Appeal Tribunal considered that this was information which the Respondent was entitled to know and the Tribunal would be entitled to order. No distinction was made between the obligation to state the grounds relied on and reserving evidence for the hearing.

This case is an example of the increasing importance being attached to the paperwork in tribunal claims. Tribunals encourage provision by both sides of as much information and detail as possible before the hearing.

This is a wind of change which blows in two directions in theory only. Since in discrimination cases it is for the applicant to prove his or her case the information tends to flow in one direction only. But perhaps in some cases respondents are simply getting their own back after completing a discrimination questionnaire.

London Borough of Barking and Dagenham v Oguoko

[2000] IRLR 179

The EAT for the first time have given guidance to Tribunals on the procedure to be adopted for written closing submissions.

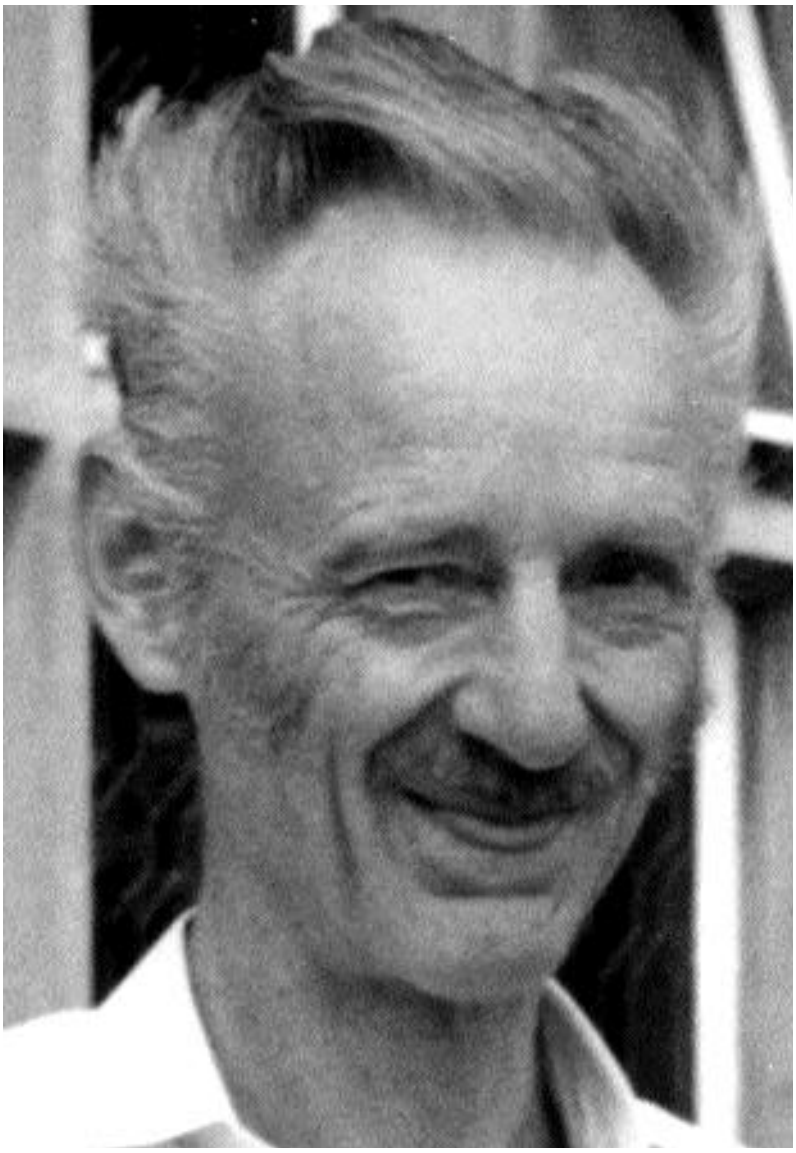
In this case the hearing was listed for two days. The Applicant's case lasted virtually for the whole of the first day, and the Respondent's case completed late on the second day. The parties agreed to deal with submissions in writing so that the case could conclude on the second day. The parties served their submissions to the Tribunal, however the submissions were not exchanged.

The EAT held that if the procedure of written submissions is to be adopted it should only be adopted with the consent of the parties. Only when consent has been obtained, can a Tribunal Chairman ensure that the procedure complies with natural justice. This will require that upon receipt of both sets of submission, the Tribunal should serve each party with the written submission of the other. Each party should be informed that they have an opportunity to make comments to the Employment Tribunal, say within 14 days. If no comment is received by the Employment Tribunal they will assume that the parties have no comment to make and they will proceed to make their decision on the submissions already presented.

The responsibility of ensuring that each party sent a copy of the other side's written submissions must rest with the Tribunal. The failure to serve copies of submissions on respective parties and afford them an opportunity to comment before the Employment Tribunal considers its decision is a breach of natural justice.

Brian Thompson

Born 13 April 1926
Died 26 February 2000



On 26th February 2000 Brian Thompson, son of Thompsons' founder W.H. Thompson, died suddenly at home. He is greatly missed by everyone who knew him.

Brian Thompson's career in the law spanned half a century, he became a leading expert in workplace accident, employment and trade union law, making a lasting contribution on behalf of Trade Unions and their members.

He was a reluctant lawyer, following the premature death of his father (W. H. Thompson) in 1947, Brian's mother (Joan Beauchamp) and brother Robin persuaded him to leave his work as a research chemist, train as a solicitor and join the family firm W H Thompson.

Brian was articled with the firm and despite refusing to take a single lecture note sailed through his

law exams and qualified as a solicitor in 1951. The brothers found themselves in their mid twenties as the sole partners running W H Thompson.

Their father had built a formidable reputation as a radical civil rights lawyer. A conscientious objector in the first world war, he had represented and then married the prominent suffragette and friend of the Pankhursts Joan Beauchamp. A founder member of the National Council For Civil Liberties, he acted for many prominent labour movement figures: Ramsay Macdonald, George Lansbury and the Poplar labour councillors.

The Brian and Robin partnership was to become as formidable. While employers had access to the most expensive lawyers, workers and trade unions had access to the Thompson brothers. It was a partnership which played a major role in shaping social security, employers liability and employment law.

During the 1950s and 60s Brian took National Insurance and Industrial Injury Act appeals to the Court of Appeal and the House of Lords. He challenged the conservative application of benefits legislation to the victims of industrial accidents, often succeeding only to face new regulations designed to defeat his success.

Many significant appeal cases were to follow, interpreting the new factory and construction laws which governed safety at factories and on building sites. Brian became a master of the complex Construction Regulations and used his expertise to gain compensation for the injured and help reduce the toll of death and injury in a notoriously dangerous industry.

One of Brian's landmark employment cases was Rookes v Barnard in 1964 where the House of Lords – in an overtly political decision –tried to reverse 60 years of trade union rights by inventing the civil wrong of "intimidation" during industrial disputes.

The decision infuriated the trade unions, caused a political furore and only strengthened Brian's contempt for the establishment. The Labour Government reversed the decision by passing the Trade Disputes Act 1965 preserving the right to withdraw labour, the minimum necessary.

More was to follow with Stratford v Lindley and then the advent of the Heath government and the ill fated Industrial Relations Act. The conflict between unions and the National Industrial Relations Court headed by Sir John Donaldson, became the graveyard of legal interference in industrial relations. The AUEW defied the court throughout, the TGWU frequently held in contempt and both subject to fines, threats of sequestration and imprisonment.

A dilemma for the incoming Labour government of 1974 was how to salvage the reputation of the courts with unions refusing to pay fines and obey court orders. One then controversial suggestion was to invite payment of outstanding fines by third parties, an idea offered by Brian and gratefully received.

He was the first solicitor to appear in person before the House of Lords. Having won the right of appeal on his own the case itself was then lost when he was forced to hand it over to barristers for the full hearing. He had some good friends amongst senior barristers and judges, but he was never overawed by the Bar and Judiciary.

During this time the Thompson brothers developed a simple and effective philosophy to force compensation for injured workers out of a reluctant insurance industry: fast and aggressive legal action. It was so successful and radically different that it became a benchmark for the future and the firm grew, as did its reputation.

Along with fast and aggressive legal action Thompsons started to select and target employers in a series of major test cases brought by injured employees. This was a type of strategic legal action never seen before: they had invented the "class action".

The first victory was against employers who had poisoned their workforce with asbestos. It was a decision which reverberated around the world with similar test cases run in other countries. More was to come: industrial deafness, welder's lung, pneumoconiosis and other industrial diseases.

Brian co-authored with Robin "Accidents at work" which was distributed free to union stewards and became a bible to many. The book went into six reprints in three years and into nearly every major workplace, helping spread a knowledge of health, safety and accident law and their message that accidents happened because employers paid too little attention to the health and safety of the workforce.

Brian continued working as a consultant for Thompsons until his sudden death. He was a brilliant and unusual man, with a wide range of interests: particularly a love of nature and concern for the environment before it became fashionable.

RODNEY BICKERSTAFFE

Disabled in the soup with insipid justification test

H J Heinz Co. Ltd V Kenrick [2000] IRLR 144

The relatively short life of the Disability Discrimination Act 1995 has been marked by a series of contradictory decisions. Some have moved the interpretation of the Act forward in a progressive and purposive way, others have retreated back into narrow, limiting analyses. The decision of the Employment Appeal Tribunal in HJ Heinz Co Ltd v Kenrick appears to move the law both forward and back at the same time.

Mr Kenrick had been ill and off work for nearly a year, when he was dismissed. At the time of the dismissal, Heinz were not aware of the diagnosis of chronic fatigue syndrome ("CFS"). Following his dismissal, Mr Kenrick brought a claim for unfair dismissal, and disability discrimination. The Employment Tribunal found in his favour, concluding that the Company knew of the symptoms, and therefore had knowledge of his disability at the time they dismissed. No satisfactory explanation had been put forward as to why they had dismissed him just a few weeks before he was due to see a consultant, and also no satisfactory evidence had been led as to why they had not considered part-time or lighter duties for him. Accordingly, the Tribunal found that the company had not justified the dismissal under the 1995 Act. They also went to hold that as a result of this conclusion, the dismissal was also unfair.

The Employment Appeal Tribunal deal succinctly with the unfair dismissal point: there is nothing in either the Employment Rights Act 1996 nor the Disability Discrimination Act 1995 which states that a dismissal which is in breach of the 1995 Act is automatically unfair. A Tribunal therefore has to consider separately whether a disability related dismissal is fair in all the circumstances, in the usual way under section 98(4) of the 1996 Act. A finding of a breach of the 1995 Act is not conclusive in the context of unfair dismissal.

In relation to the Disability Discrimination Act findings, the Appeal Tribunal decide that an employer does not need to know of the disability, or the material features of it, before they can be found to have discriminated against a disabled employee in terms of Section 5(1) of the 1995 Act. In this case, the fact that Heinz were not aware of the diagnosis of CFS (even though they were aware of the symptoms) did not mean that they could not discriminate. In fact, the Appeal Tribunal go further than this. Even if an employer is unaware of the symptoms, they may still be liable since the test is an objective one: all that matters is that the employee is disabled and the discrimination relates to the disability. So in this clear and unequivocal statement, the baleful decision of O'Neill v Symm & Co 1998 IRLR 233 is at last overturned.

So far so good. The less helpful aspect of the decision relates to the standard of justification required to be shown by employers under section 5(1). Although upholding the Tribunal's decision that the Company had discriminated against Mr Kendrick, the Appeal Tribunal emphasise the point that the 1995 Act only requires the justification of an apparently discriminatory act under section 5(1) to be "material to the circumstances of the particular case and substantial", with substantial meaning no more than "not just trivial or minor". If therefore the previous case of Baynton v Saurus General

Engineers Ltd (LELR 42, [1999]IRLR 604) suggested more than this, with its "balancing" of interests between the employer and employee, then it overstated the case.

This decision does limit the impact of section 5(1) quite considerably. "Not just trivial or minor" is an easy threshold for employers to establish. More or less any consideration can be neither trivial nor minor, regardless of the devastating consequence that the decision might have on an employee.

This is a disappointing decision, and hopefully not the last word on the matter, since a more purposive interpretation of the Act could well have reached a different conclusion. Nonetheless, pending another decision pointing the other way, the clear lesson to be learned from the Heinz v Kendrick case is that Applicants should not just rely on section 5 (1) discrimination. In more or less all cases, a failure to adjust under section 5 (2) should also be included. Under section 5(2), the test of justification is expressly subject to the specific and demanding considerations of section 6. Given that these considerations are spelt out in the Act itself, and elaborated upon in the Code, the section 5(2) duty of adjustment will impose a much tougher duty on employers to accommodate employees with disabilities. As a result of this Heinz case, it is section 5(2) which will now assist and protect employees with disabilities in the purposive and constructive way that the Act intended. Section 5(1) will only be of use in those few cases where the employers' conduct is unreasonable and cannot be justified in any rational way

Three ball pool

Taylor v Commissioners of Inland Revenue [1999]

IDS Brief 649 Nov 2000

In indirect discrimination claims, the key is often to identify the right pool for comparison. The Applicant has to prove that the proportion of women (in a sex discrimination claim) who can comply with a condition or requirement is significantly less than the proportion of men who can comply. What happens when there are a number of separate requirements, each of which has to be satisfied and the Applicant can comply with all bar one of the requirements? In Taylor v Commissioners of Inland Revenue, the Employment Appeal Tribunal confirms that the correct pool in that situation encompasses all workers who can comply with the same requirements as the Applicant.

Ms Taylor was a Valuation Executive. Under her employer's promotion scheme, all executives were eligible for automatic promotion if they:

1 had at lest three years' valuation officer experience;

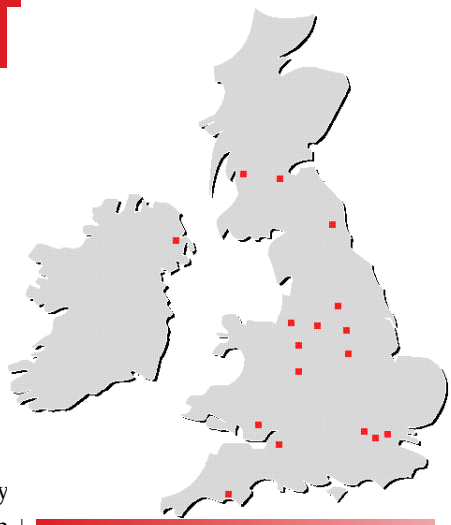
2 gained appropriate professional membership by the end of 1993; and **3** received a performance score of two or above. Ms Taylor complied with the first and second but not the third.

In assessing the pool for comparative purposes, the Employment Tribunal treated the three criteria as indivisible. This meant that the appropriate pool comprised all executives to whom the scheme applied. The proportion of women who could comply with all three criteria was not significantly different to the proportion of men who could not comply with all three (but who may have been able to comply with one or two). In any event, according to the Tribunal, any disparate impact would be justified.

The Employment Appeal Tribunal allowed Ms Taylor's appeal. The correct pool was all those who could comply with requirements (1) and (2). On the facts, a significantly smaller proportion of women who could comply with (1) and (2) could also comply with (3) than was the case for men who could comply with (1) and (2). The EAT also found that the Tribunal had failed to carry out the necessary balancing exercise between the interests of the employer and the worker and had taken into account irrelevant factors when determining the issue of justification.

This is plainly right. Employers should not be allowed to hide discriminatory criteria in a matrix of requirements which, overall, may disclose no disparate impact.

Equal or not?



Glasgow City Council and Others v Marshall and Others [1999] IDS Brief 656

Enderby v Frenchay Health Authority (No.2)

Evesham v North Hertfordshire Health Authority and another

Hughes v West Berkshire Health Authority and Another [2000] TLR 29/2/00

We report below two disappointing decisions of the higher courts on equal pay. In Glasgow City Council v Marshall, the House of Lords confirms that employers will only have to justify pay differentials in equal pay claims where the material factor relied upon is itself discriminatory.

Ms Marshall and her colleagues were employed as instructors at special needs schools and paid less than the teachers. They claimed equal pay to that of male teachers, but they could not show a gender disparity between the two groups of employees.

The Tribunal found that instructors and teachers carried out "like work" and that the mainly historical reasons relied on by the employer did not establish a "material factor" defence. The Employment Appeal Tribunal refused to allow the employer's appeal, but that was over-turned by the Court of Session.

Drawing on Strathclyde Regional Council v Wallace and others, the House of Lords found that the employer's material factor defence succeeded. Having proved that the reason for the disparities in pay were not due to sex discrimination, the employer did not have to go on to justify the variation in pay further.

In practice, this means that equal pay claims are going to be very difficult to win without an apparent taint of discrimination.

Ms Evesham, in her case, succeeded in showing that her work was of equal value to that of her male comparator. She had been in post for five years longer than her comparator. Her contract of employment contained a right to incremental progression on an annual basis. She therefore claimed that the real effect of an equality clause should be to give her a rate of pay equal to what her comparator would get if he had five more years service.

The Court of Appeal disagreed. It found that, if the assessment of Ms Evesham's job as being of equal value to that of her comparator included her years in post as a factor, then to allow her to calculate her pay as she claimed would involve an element of double-counting of her experience. She was therefore only entitled to the same rate of pay as currently paid to her comparator

If the assessment of the applicant's job at the equal value stage had taken into account her years in post and she would not otherwise achieve equality with her comparator, then it may be that the applicant is benefiting twice if she is able to rely on her own incremental progression to achieve a higher rate of pay than her comparator. But the Court of Appeal failed to analyse the equal value assessment of Ms Evesham's job to see if her experience was indeed a relevant factor.

We are still waiting on the European equal pay judgments reported in last month's issue. Hopefully better news is on the horizon.

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